



State of New Hampshire  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095  
(603) 271-3503 FAX (603) 271-2867



Warren Wilbur  
d/b/a C & W Excavating  
19 Griffin Street  
Keene, NH 03431

Re: 244 Winch Hill Road  
Swanzey, New Hampshire

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
AND HEARING  
No. AF 02-037**

**October 17, 2002**

**I. INTRODUCTION**

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("the Division") to Warren Wilbur, d/b/a C & W Excavating pursuant to RSA 149-M and Env-C 612. The Division is proposing that a fine of \$20,000 be imposed against Warren Wilbur, d/b/a C & W Excavating for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. PARTIES**

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH 03301.
2. Warren Wilbur, d/b/a C & W Excavating ("CWO") is an individual having a mailing address of 19 Griffin Street, Keene, NH 03431.

**III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS**

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted Env-Wm 100 – 300, 2100 *et seq.* ("Solid Waste Rules") to implement this program.
2. Pursuant to RSA 149-M:16, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of RSA 149-M or rules adopted pursuant thereto. Pursuant to these sections, the Commissioner has adopted Env-C 612 to establish the schedule of fines for such violations.
3. Cleveland D. Prince, Jr. and Jodie E. Prince are the owners of land located at 244 Winch Hill Road, Swanzey, New Hampshire, more particularly described in a deed recorded in the Cheshire County Registry of Deeds at Book 1582, Page 868, and identified on Swanzey Tax Map 65, as Lot 1-1 (the "Site").

4. On April 4, 2002, Division personnel received a complaint alleging that solid waste was being dumped at the Site and used as fill.
5. On April 25, 2002, Division personnel investigated the allegations of illegal disposal of solid waste at the Site.
6. RSA 149-M:4, XXII defines "solid waste" as "any matter consisting of putrescible material, refuse, residue from an air pollution control facility, and other discarded or abandoned material."
7. RSA 149-M:4, XXI defines "refuse" in part, as "any waste product ... which is composed wholly or partly of such materials as ... brick, plaster or other waste resulting from the demolition, alteration, or construction of buildings or structures; or accumulated waste material, cans, containers, tires, junk, or other such substances which may become a nuisance."
8. Env-Wm 102.42 defines "construction and demolition debris" in part, as "non-putrescible waste building materials and rubble which is solid waste resulting from the construction, remodeling, repair or demolition of structures or roads. The term includes but is not limited to, bricks, concrete and other masonry materials, wood, wall coverings, plaster, dry wall, plumbing, fixtures, non-asbestos insulation or roofing shingles, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes and electrical wiring and components, incidental to any of the above and containing no hazardous liquid or metals. The term does not include asbestos waste, garbage, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, furniture, appliances, tires, drums and containers, and fuel tanks."
9. During the April 25 inspection, Division personnel observed approximately 140 cubic yards of total fill, including soil, wood, insulation, vinyl siding, wire, and bricks at the Site. The location of the waste indicates that it is being used to expand the vehicle parking area at the Site.
10. The wood, insulation, vinyl siding, wire, and bricks observed by Division personnel at the Site are solid waste as defined by RSA 149-M:4, XXII.
11. RSA 149-M:4, IX defines a "[solid waste] facility" as "a location, system, or physical structure for the collection, separation, storage, transfer, processing, treatment or disposal of solid waste."
12. The Site constitutes a "solid waste facility" as defined by RSA 149-M:4, IX.
13. Env-Wm 102.116 defines "owner" as "a person who owns a facility or part of a [solid waste] facility."
14. Cleveland Prince, Jr. and Jodie Prince are the owners of a solid waste facility.
15. RSA 149-M:9, I states that "No person shall construct, operate or initiate closure of a public or private facility without first obtaining a permit from [DES]."

16. A review of Division files show that neither Cleveland Prince, Jr. nor Jodie Prince has applied for or holds a permit to operate a solid waste facility at any New Hampshire location.
17. RSA 149-M:9, II states that "It shall be unlawful to transport solid waste to, or dispose of solid waste at, any facility other than an approved [solid waste] facility."
18. On April 30, 2002, Division personnel met with Jodie Prince and Cleveland Prince, Sr. to discuss the solid waste issues at the Site. Ms. Prince informed Division personnel that the solid waste observed at the Site had been brought to the Site by Warren Wilbur. Mr. and Ms. Prince were informed by Division personnel that the solid waste would need to be removed and disposed of at a permitted solid waste facility.
19. On May 1, 2002, Cleveland Prince, Jr. contacted Division personnel. During the telephone conversation, Mr. Prince informed Division personnel that he had accepted money from Mr. Wilbur to have the solid waste brought to the Site.
20. On May 1, 2002, Division personnel contacted Mr. Wilbur to discuss the solid waste issues at the Site. Mr. Wilbur informed Division personnel that he had paid Mr. Prince to burn the solid waste at the Site.
21. On May 2, 2002, Division personnel conducted a follow-up inspection of the Site. Division personnel met with Cleveland Prince, Sr. and Warren Wilbur, d/b/a C&W Excavating. Mr. Wilbur admitted to Division personnel that he had brought approximately 60 plus cubic yards of solid waste to the Site. Division personnel explained to Mr. Prince and Mr. Wilbur that the solid waste at the Site would need to be removed to a permitted solid waste facility.
22. Warren Wilbur, d/b/a C&W Excavating transported solid waste to and disposed of solid waste at an unpermitted solid waste facility.
23. On June 28, 2002, the Division issued Administrative Order No. WMD 02-18 to Warren Wilbur, d/b/a C&W Excavating. On June 28, 2002, the Division also issued Administrative Order No. WMD No. 02-17 to Cleveland Prince, Jr. and Jodie Prince for operating an unpermitted solid waste facility by accepting the solid waste from Mr. Wilbur.
24. On August 23, 2002, Division personnel conducted a follow-up inspection at the Site. As of this date, two 30 yard roll-offs of construction and demolition debris has been removed from the Site by Cleveland Prince, Jr. and Jodie Prince. Division personnel estimate that approximately five more roll-offs (approximately 150 cubic yards) of debris remains at the Site.
25. To date, Mr. Wilbur has made no effort to assist Cleveland Prince, Jr. and Jodie Prince in cleaning-up the Site.

#### **IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES**

1. Warren Wilbur d/b/a C&W Excavating has violated RSA 149-M:9, II by transporting solid waste to an unpermitted solid waste facility. Pursuant to Env-C 612.11(b), a fine of \$2,000 per 20 cubic yards or portion thereof transported or disposed. For this violation, the Division is seeking a total fine of \$20,000.

2. Warren Wilbur d/b/a C&W Excavating has violated RSA 149-M;9, II by disposing of solid waste at an unpermitted solid waste facility. At this time, the Division is not seeking a fine for the violation identified in IV.2, above.

**The total fine being sought is \$20,000.**

#### **V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING**

**Pursuant to Env-C 601.06, Connecticut Waste Oil is required to respond to this notice. Please respond no later than November 18, 2002, using the enclosed form as follows:**

- . If Warren Wilbur, d/b/a C & W Excavating plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to the DES Legal Unit, at the address as noted on the form.
2. If Warren Wilbur, d/b/a C & W Excavating chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Warren Wilbur, d/b/a C & W Excavating wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Warren Wilbur, d/b/a C & W Excavating's interest in settling.

Warren Wilbur, d/b/a C & W Excavating is not required to be represented by an attorney. If Warren Wilbur, d/b/a C & W Excavating chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

**If Warren Wilbur, d/b/a C & W Excavating wishes to have a hearing but is unable to send an authorized representative to the hearing as scheduled, Warren Wilbur, d/b/a C & W Excavating must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If Warren Wilbur, d/b/a C & W Excavating does not notify the DES Legal Unit in advance and does not have an authorized representative attend the hearing, the hearing will be conducted anyway in accordance with Env-C 204.09.**

#### **VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES**

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Warren Wilbur, d/b/a C & W Excavating committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Warren Wilbur, d/b/a C & W Excavating committed the violation(s) and that the amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine(s) sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Warren Wilbur, d/b/a C & W Excavating proves, by a preponderance of the evidence, applies in this case:**

- 1 The violation was a one-time or non-continuing violation, **and** Warren Wilbur, d/b/a C & W Excavating did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Warren Wilbur, d/b/a C & W Excavating did not benefit financially, whether directly or indirectly, from the violation.
- 2 At the time the violation was committed, Warren Wilbur, d/b/a C & W Excavating was making a good faith effort to comply with the requirement that was violated.
- 3 Warren Wilbur, d/b/a C & W Excavating has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
- 4 Other information exists which is favorable to Warren Wilbur, d/b/a C & W Excavating's case which was not known to the Division at the time the fine was proposed.

### **IMPORTANT NOTICE**

**An administrative fine hearing that has been scheduled is a formal hearing.** Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Warren Wilbur, d/b/a C & W Excavating's opportunity to present testimony and evidence that Warren Wilbur, d/b/a C & W Excavating did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Warren Wilbur, d/b/a C & W Excavating has any evidence, such as photographs, business records or other documents, that Warren Wilbur, d/b/a C & W Excavating believes show that Warren Wilbur, d/b/a C & W Excavating did not commit the violation(s) or that otherwise support Warren Wilbur, d/b/a C & W Excavating's position, Warren Wilbur, d/b/a C & W Excavating should bring the evidence to the hearing. Warren Wilbur, d/b/a C & W Excavating may also bring witnesses (other people) to the hearing to testify on Warren Wilbur, d/b/a C & W Excavating's behalf.

**If Warren Wilbur, d/b/a C & W Excavating wishes to have an informal meeting to discuss the issues, Warren Wilbur, d/b/a C & W Excavating must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.**

\* \* \* \* \*

Information regarding this proposed fine may be made available to the public via DES's Web page ([www.state.nh.us/des](http://www.state.nh.us/des)). If Warren Wilbur, d/b/a C & W Excavating has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

**COPY**  
\_\_\_\_\_  
Philip J. O'Brien, Director  
Waste Management Division

Enclosure (*NHDES Fact Sheet #CO 2002*)

cc: DB/File  
Gretchen Rule, DES Legal Unit  
Susan Alexant, DES Legal Unit  
Tammy Calligandes

**\*\*\* RETURN THIS PAGE ONLY \*\*\***

**WARREN WILBUR, D/B/A C & W EXCAVATING IS REQUIRED BY LAW TO RESPOND TO  
THIS NOTICE.**

**PLEASE RESPOND NO LATER THAN NOVEMBER 18, 2002**

**Please check the appropriate line and fill in the requested information below.**

**APPEARANCE On behalf of Warren Wilbur, d/b/a C & W Excavating,**

**I request to have a formal hearing scheduled in this matter.**

**I request to have a pre-hearing conference scheduled in this matter.**

**I would like to meet informally to discuss the issues in this matter.**

**WAIVER OF HEARING On behalf of Warren Wilbur, d/b/a C & W Excavating,**

**I certify that I understand the right to a hearing regarding the imposition of the  
proposed administrative fine and that I hereby waive those rights. The fine payment  
in the amount of \$20,000 payable to "Treasurer, State of New Hampshire" is  
enclosed.\***

**Pursuant to Env-C 203.05 please provide the following information:**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

**Name (please print or type):** \_\_\_\_\_

**Title:** \_\_\_\_\_

**Phone:** \_\_\_\_\_

**RETURN THIS PAGE ONLY TO:**

**Department of Environmental Services  
Legal Unit  
6 Hazen Drive, P.O. Box 95  
Concord, NH 03302-0095**

- \* If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.**